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THE EMERGING AUTHORITY OF CROWN OFFICE IN THE IMPERIAL AGE: A DISCUSSION PAPER

Robert S. Shiels¹

Abstract:

Although Crown Office is central to the Scottish criminal justice system there has been little modern study of the history of the department and no attempt to locate it within the Scottish constitutional arrangements. Consideration is given here to the evolution of the administrative headquarters of the public prosecution system from the mid-Victorian era when great cohesion was brought to the system through to the statutory intervention of 1927 that consolidated the independent position of the local public prosecutor albeit subject to Crown Office direction.

Keywords: Scotland; public prosecution; Victorian administration; hierarchical authority; incremental development

Introduction

As early as 1867 Walter Bagehot noted that the literature on the constitution was huge.² In his view, an observer who looked at the living reality of the constitution would wonder at the contrast to the paper description. In life there was much, he also asserted, which was not in the books and there would not be found: 'in rough practice many refinements of the literary theory'.³ The point at least about there being much in life not in books may be said to apply to Crown Office, the administrative head office of the system of public prosecution in Scotland.⁴ Little has been written of the office although it seems to be that only comparatively recently that the idea of a legal system has received explicit attention.⁵ It is understandable then that constituent elements might similarly have been neglected.

There is a place in the constitution of Scotland for Crown Office, particularly as the constitution or system of government of a country is a wider concept than the law of the constitution.⁶ Moreover, recent textbooks on public law in Scotland have not given any attention to Crown

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² W. Bagehot, *The English Constitution* (2001 pb. reprint), p. 5.

³ Bagehot, *The English Constitution*, p.5.

⁴ It would seem to be a matter of practice of longstanding that in everyday conversation the definite article before 'Crown Office' was not and often still is not used.

⁵ G. Maher, 'The Identity of the Scottish Legal System' (1977) *Juridical Review* 21, pp. 21-2.

⁶ G. Marshall, *Constitutional Theory* (Oxford: Clarendon Press, 1971), p. 11.

Office.⁷ That, on one view, seems a strange omission given the centrality of the place as an administrative head office within government. Finally, to be acceptable the law must be coherent. It must be principled.⁸ The same must surely be said of the administration of a system of public prosecution. To concentrate on one part of 'government machinery' has been described as desirable because there are too few histories of them. There are, however, risks in that the concentration on one particular institution may mean that 'too much credit' is given to that.⁹ Professional legal opinion did not dissent from the emerging position of Crown Office in the legal system and general public opinion seemed not to have reached any concluded view.¹⁰ Further, it was asserted in 1878 that the Scottish and French systems were not very different.¹¹ The preliminary procedure in Scotland did correspond much more to the notion of an official inquisition into the truth of a charge than to the idea of litigation between competing parties.¹²

Contemporary academic comment, admittedly long after the Victorian era, noted that the nature of the Scottish system suggested strong and varying influences from outside:

On the level of institutional structures, one finds in Scotland an unusual pastiche of continental 'bureaucratic' ideas with the traditional common law institutions. The ultimate French inspiration of the office of public prosecutor is unmistakable, notwithstanding the fact that the office was centralised only after the wave of continental influences had long subsided. The prosecutorial organisation manifests all the essential attributes of a hierarchical bureaucratic institution. Its powers are quite surprising in view of the dominance of the common law features in the total system.¹³

The true nature and extent of the government of Scotland after the Union of 1707 is important in itself but it is also worth considering in detail because of the apparent divergence from the structure of government specific to England and the broad toleration of such differences by the Imperial Government.¹⁴ It is remarkable that Crown Office, within the English sphere of influence in the context of British Government, could come to supervise a system so patently continental.

⁷ A. Page, *Constitutional Law of Scotland* (Edinburgh: W Green; 2015) and C.M.G. Himsworth and C.M. O'Neill, *Scotland's Constitution: Law and Practice* (Haywards Heath: Bloomsbury Professional, 3rd ed. 2015).

⁸ *Fairchild v. Glenhaven Funeral Services Limited*, [2003] 1 AC 32 *per* Lord Nicholls of Birkenhead, [36].

⁹ Book review, J.D.B. Mitchell, (1956) *Juridical Review* 209.

¹⁰ For discussion of the distinction between types of public opinion see D.M. Walker, 'Law and Opinion in Britain since 1900' (1956) *Juridical Review* 117-146 and 213-239, 119.

¹¹ A.D. Elliott, *Criminal Procedure in England and Scotland* (London: Wm. Ridgway; 1878) p. 27.

¹² Elliott, *Criminal Procedure* pp. 23-4.

¹³ M.R. Damaska, 'Criminal Procedure in Scotland and France' 24 *Am. J. Comp. L.* 799, 781 (1976).

¹⁴ 'Until well into the twentieth century, the limited scope of government was indeed a hallmark of Anglo-American polity': M. R. Damaska, *Evidence Law Adrift* (New Haven, Yale University Press, 1997) p. 136.

Further, from 1880 to 1914, there was almost constant discussion in political circles about adjusting the constitutional relationship between the United Kingdom and Scotland.¹⁵ Given that the Lord Advocate, until the re-introduction of the office of Secretary for Scotland in 1885, was in effect the principal representative in Scotland of the Imperial Government, and vice versa, it is not an unworthy effort that examines the source of counsel for government. That is especially so if differences in approach are known to have arisen.¹⁶ Moreover, the analysis of principles and institutions can lead to a true understanding of them, and of the causes of present dangers.¹⁷

1 The Crown Agent's Office

As a matter of constitutional theory a Government department has been said not to be a legal entity but it is merely 'a collective name for the Minister's assistants or staff'.¹⁸ No source or authority was cited for that proposition of theory but the correctness is suggested by the merest investigation of past circumstances. Before considering these it should be emphasised that the modern reference to institutions and types of law are not necessarily helpful when analysing the practice of law. It remains far from clear that those matters that were viewed one way or another by a modern commentator were regarded as defects, for example, by contemporaries. Moreover, what might now be considered a defect need not necessarily in its time have prevented the effective operation of the system.¹⁹

It seemed 'probable' to others that the premises at Parliament Square, Edinburgh, were acquired after the fires of 1810 and 1820.²⁰ By the late nineteenth century it could be said that:

since the time of Sir William Rae [who last demitted office as Lord Advocate in 1835] at least, a complete machinery for the investigation of crime has been established by the Lord Advocate, by securing communication with all local prosecutors through the agency of the Crown Office²¹

¹⁵ D. Carradine, *Making History Now and Then: Discourse, Controversies and Explorations* (Basingstoke: Palgrave Macmillan, 2001) p. 177.

¹⁶ The Lord Advocate differed from the Home Office in the matters of offering rewards for information: F.C. Mather, *Public Order in the Age of Chartism* (Manchester: Manchester University Press, 1959) p. 37, fn. 2.

¹⁷ J.D.B. Mitchell, 'The Anatomy and Pathology of the Constitution', (1955) 65 *Juridical Review* 1, 18.

¹⁸ W.I.R. Fraser (later Lord Fraser of Tullybelton) *An Outline of Constitutional Law*, (Edinburgh and Glasgow: Wm Hodge, 2nd ed. 1948) p. 139.

¹⁹ L. Farmer, *Criminal Law, Tradition and Legal Order: Crime and the Genius of Scots Law, 1747 to the Present* (Cambridge: Cambridge University Press, 1997) p. 31.

²⁰ D.J. Dickson and A.D. Vannet, *The Laws of Scotland: Stair Memorial Encyclopaedia: Criminal Procedure* (2008) p.31 para. 41 fn. 2.

²¹ Anon. 'The True Method of Criminal Inquiry' *The Scotsman* November 9, 1881 p. 9; the article continued in later issues on December 3, 1881 p. 11 and December 22, 1881 p. 3.

The implied suggestion of a policy by all Lord Advocates may be noted in that comment. Consideration of the issue of public prosecution in any event in the newspapers of the time followed the introduction of public prosecution to some degree by the Prosecution of Offences Act 1879 in England. That statute was notable for having been a Government measure rather than a Private Members Bill as in the past.²² That the Scottish system of public prosecution worked well was certain for some of the lawyers of the time: prior to the legislation of 1879: 'it would have required some argument to convince our neighbours of the advantage of an arrangement from which we have derived so many benefits'.²³ From the Bench: 'a more efficient and a more satisfactory mode of conducting criminal affairs does not exist in any country in the world'.²⁴ Certainly, Sir Archibald Alison wrote of the statistical returns from the Circuit Courts being available from Crown Office, although in the absence of how that might be done he was presumably writing for people who knew the system, more specific details of the location or business arrangements were not provided.²⁵ Therein lies part of the problem: those who knew how the system worked did not need to read the details of the business arrangements: those who did not know how the system worked had little means of finding out other than asking those who did.

There was a place for Crown Office as a source of information to central government which in effect was the Imperial Government in London. There is something suggested of that role in an instruction of the Lord Advocate on 1 May 1848 that as there had been a lack of information about widespread riots and disturbances then, Sheriffs of counties were requested that any such event was to be reported immediately to the Home Secretary and to the Lord Advocate.²⁶ The request suggests a strong reactive aspect to central government. More importantly for present purposes, it is suggested, is the appearance of such a request for information to Sheriffs of counties in the Book of Regulations for the Procurators Fiscal: the local judicial officer who had appointed the local public prosecutor had full knowledge, or access to it, of what was required of the individual who had the responsibility for the investigation of crime and the procedure surrounding its prosecution.

Even in Sir Archibald's time the importance of Crown Office for administrative arrangement was assured: 'There are now transmitted between 800 and 1000 cases for the opinion of the

²² P.B. Kurland and D.W.M. Waters, 'Public Prosecution in England, 1854-79: An Essay in English Legislative History' (1959) *Duke LJ* 439, p. 562.

²³ Anon. 'The True Method of Criminal Inquiry', December 22, 1881 p. 3.

²⁴ *HM Advocate v. Robertson* (1887) 15 Rettie (J) 1 per Lord Justice Clerk Moncreiff.

²⁵ Sir Archibald Alison, *Practice of the Criminal Law of Scotland* (Edinburgh: Wm Blackwood, 1833) p. xl.

²⁶ NAS AD 5/11 Crown Office "Regulations To Be Observed in Criminal and Other Investigations" (Edinburgh, 1868) Part Second, Title Second, reg. 1.

Crown officers every year.²⁷ The average of these figures might be said to be around 16 to 20 cases per week over 50 weeks in the year: in short, 3 or 4 sets of case papers for consideration for prosecution each working day were around 1832 delivered from outlying offices of Procurators Fiscal to Crown Counsel. There would be routine practices of receiving physically and then preparing these papers for the decision-making process.²⁸ The need for control of Crown papers may have been most marked in the administrative work for the listing of cases where the matter was to be indicted to the High Court of Justiciary or a sitting of the court away from Edinburgh.²⁹ Further, the prisoner who was committed for trial had the protection of the Criminal Procedure Act 1701 and the sharp demands of time-bars required no doubt close attention to arithmetical calculations of days in custody and superintendence of the papers.³⁰

The necessity in a system of public prosecution of having a head office was accentuated in any event by the division of the legal profession into advocates, as members of the Faculty of Advocates, and solicitors, known in the early nineteenth century and for years later by a number of varying nomenclatures. The office of Lord Advocate was invariably filled by a member of the Faculty of Advocates and by the 1860s the appointment of Crown Agent was invariably made from amongst members of the solicitor branch of the legal profession: it did not follow that the Lord Advocate was 'instructed' by the Crown Agent or vice versa, nor even that the Crown Agent was a member of the Scottish administration or Government.³¹ In 1868, selecting for present purposes a year at random, the 'Crown Agent's Office' was given as Parliament Square, Edinburgh, 'Hours 10-4', the place being listed separately from the person of the Crown Agent. No other details of staff were given.³² Twenty years later, in 1888 Crown Office, named as such, 'Hours 10-4', had an address more accurately given as 9 Parliament Square, Edinburgh. The Crown Agent was named and so too then were the Chief Clerk and the other three clerks, with reference to a vacancy for a fifth clerk. There were two messengers.³³ A further 20 years later in 1908 Crown Office, 'Hours 10-4, Saturday 10-1', was still at 9 Parliament Square, Edinburgh and the Crown Agent was named as were the six clerks

²⁷ Alison, *Practice* p. xvi.

²⁸ A. Maitland, Crime: *Criminal Administration* in Lord Dunedin (Editor), *Encyclopaedia of the Laws of Scotland* (Edinburgh: W. Green, 1928) vol. 5, p. 184, para. 457.

²⁹ Alison, *Practice* p. xix.

³⁰ Alison, *Practice* p. xxvii.

³¹ *Goatley v. HM Advocate*, [2006] HCJAC 55; 2008 J.C. 1; 2007 S.L.T. 13; 2006 S.C.C.R. 462.

³² E. Ravenscroft, *Index Juridicus: The Scottish Law List and Legal Dictionary* (Edinburgh: TC & EC Jack, 1868) pp. 4 and 16.

³³ Ravenscroft, *Index Juridicus*, (1888) p. 7 and 19. Their importance increased with the option of taking papers to Waverley for transmission by the next train to a local court for the attention of the Procurator Fiscal.

and two messengers.³⁴ Thereafter, in 1918 it was recorded that in Crown Office still at the same postal address there were along with the Crown Agent still only six clerks, with a vacancy then to be filled. There were two messengers.³⁵ By 1928 the Crown Office again still at the same postal address had reduced the staff to four clerks although there was by then one shorthand typist and also the two messengers.³⁶ It is merely a matter of comment now that the move as perceived by historians from *laissez faire* to collectivism over a period of 60 years down to 1927 (interrupted by the then unprecedented conditions of the First World War) resulted in a reduction of two clerks in Crown Office.

The term 'clerk' ought not to be considered in any pejorative sense in the context of the time under scrutiny. Crown Counsel changed with the government of the day as did the holder of the office of Crown Agent. The clerks collectively provided the necessary institutional memory of precedents and central practice of a national system, and did so for a long period of time. The continuous employment of these Clerks proved the existence of a latent institutional knowledge accumulated by the experience of the application of practice to problems. That experience amounted to a reserve of practice in the manipulation, in the best sense of the term, of the criminal procedures then to which no private prosecutor could have access, beyond that of counsel who had at some time been in office as Crown Counsel. Messengers were of course essential to the movement of case papers between Crown Office and Crown Counsel, the latter often working very nearby in the Advocates' Library or at home elsewhere in the centre of Edinburgh. This was in itself a fine example of minimalist government, that is to say more than anything else, inexpensive government. It seems indictments, and their many copies that were needed for the business of prosecution, were printed in draft form and revised and then printed finally at short notice by commercial firms close to Parliament House. Messengers were needed for such business.³⁷

There must, however, have been a perceived demand for information, possibly in Whitehall generally speaking, as to how the Scottish system of government was constituted. In one article there was dealt with in the first instance the departments situated in Parliament Square.³⁸ The general duties and functions of Crown Office are described there but more from the legal perspective than an administrative approach, and certainly without any analysis of the nature and functions of the centre of authority. The importance of the series of short articles

³⁴ Ravenscroft, *Index Juridicus*, (1908) p 29.

³⁵ Ravenscroft, *Index Juridicus*, (1918) p.30.

³⁶ Ravenscroft, *Index Juridicus*, (1928) p.32.

³⁷ There seems to be no formal history of this aspect of the work but the comment reflects oral history in narrating the practice now which of course ended with the introductions of the modern computer.

³⁸ Anon. 'Our Scottish Official Departments' (1904) 20 *Scottish Legal Review* 31-33, p. 31.

is reflected in the comment: 'The division of functions in the State is a necessary condition of its rational organisation.'³⁹ Certainly, the position of Crown Office in the legal system, privileged by its uniqueness, appears to have developed over a long time to be in effect comparable to what has been described as 'a series of private chambers'.⁴⁰ These have been said to be working chambers where legal work was done and 'men passed their lives often in apparently grim and uninspiring circumstances'.⁴¹ Located in close proximity to the private chambers that constituted the College of Justice, Crown Office was essentially a public chamber for the public prosecutor.

For the Crown Agent's Office in the early part of the nineteenth century there was probably little different in regard to conditions and purpose between it and the others nearby: the office formed a focus for the work of the Law Officers and the other advocates who constituted Crown Counsel. The office was a place of support as needed for litigation either in the courts in the immediate vicinity or elsewhere but on the direction of central authority. Crown Office was thus a merely a few rooms that served as a conduit or agency of some of the authority from the Imperial Parliament or as a source of authority in its own right for limited aspects of the minimal but increasing central government of Scotland. Everything in the government of Scotland, administration and politics, changed with the re-introduction of the office of Secretary for Scotland in 1885. The exact nature and balance of authority between the Home Office and Crown Office is a matter for separate consideration but the increase in governmental control, regulation and inspection in the later Victorian period is well known. The associated legislation gave rise to prosecutions 'mostly in the lower courts, but some of the cases reached the High Court on points of interpretation, whether something was or was not within a category within the meaning of one of the Acts.'⁴² Either way, the system required increasingly careful scrutiny and management.

Crown Office ought to be seen as representing in some way 'the State', a reference: 'to some or all of the legal or administrative or legislative institutions operating in a community'.⁴³ Yet, nothing went unchanged: the re-ordering of power and the almost authoritarian centrality of Crown Office were continuous events reaching perhaps some sort of apotheosis with the judicial view that it was well known that Crown Office did not give up documents when asked

³⁹ B. Bosanquet, *The Philosophical Theory of the State* (London: Macmillan; 2nd edn, 1910) p. 282.

⁴⁰ J. Finlay, *The Community of the College of Justice: Edinburgh and the Court of Session, 1687-1808* (Edinburgh: University Press, 2012) Chapter 7.

⁴¹ *Ibid.*, p. 188.

⁴² D.M. Walker, *A Legal History of Scotland: Volume VI; the Nineteenth Century* (Edinburgh: Butterworth LexisNexis, 2001) p. 183

⁴³ G. Marshall, *Constitutional Theory* (Oxford: Clarendon Press, 1971), p. 14.

for them.⁴⁴ One view before the Great War was that a trial: 'is the investigation and determination of issues between parties'.⁴⁵ The nature of such a trial must be considered idiosyncratic where one of the parties is almost invariably the State.

There are at least four aspects to the role of Crown Office that merit notice. First, there is the place of Crown Office in the limited Scottish administration. The dominant system of public prosecution at one point was noted and retained the confidence of at least one Prime Minister.⁴⁶ The public place of Crown Office must have been assured in the absence of any substantial right to, or at least opportunity to, commence a private prosecution: 'Public prosecution of crime in Scotland has proved so satisfactory that the ancient system of private prosecution at the instance of the wronged or injured by the crime is practically unknown'.⁴⁷ At the very least, the necessary claim on public expenditure now justifies some consideration of the department. Until recent publication the older textbooks avoided any mention of Crown Office although the centrality of the office of Lord Advocate was recognised in principal at least.⁴⁸ Perhaps some of the difficulty was noted long time ago: 'The Lord Advocate possessed privileges and powers as a public prosecutor which hardly appeared in keeping with the general limits prescribed by the Constitution to Executive officers'.⁴⁹

Secondly, the department is a place of business of the Scottish Law Officers and the exercise of constitutional authority, including the provision of legal advice to the Scottish Government. Yet in Crown Office are the civil servants, some legally qualified and some not, who constitute the permanent staff. That much would remain correct even if large areas of prosecution in Scotland were to be privatised as some degree of supervision would remain necessary in the public interest. A wide variety of roles are fulfilled there. The 'usual' rules as to political impartiality of civil servants require to be upheld, although it has been argued that what is now in place is a 'civil service of the State' that is a separate Scottish civil service in all but name.

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Thirdly, in the context of the administration of criminal law the decisions are of crucial concern: Sir Gerald Gordon QC referred almost 50 years ago to the almost impossibility then of finding

⁴⁴ *Dawgray v. Gilmour*, [1907] SC 715 per the Lord President (Dunedin), p. 720. That practice possibly reflects the principle of *nemo tenetur edere instrumenta contra se* [no one is bound to produce instruments against himself]

⁴⁵ W.R. Smith, *Medical Jurisprudence from the Judicial Standpoint* (London: Steven & Sons, 1913) p. 19.

⁴⁶ Sir Robert Peel, HC Deb vol. 14, cc. 1214-44 (March 9, 1826)

⁴⁷ R.W. Renton and H.H. Brown, *Criminal Procedure According to the Law of Scotland* (Edinburgh: W. Green, 5th edn., 1983) p. 24, para. 4-04 and authorities cited there.

⁴⁸ J.D.B. Mitchell, *Constitutional Law* (Edinburgh: W Green, 2nd ed. 1968) p. 206.

⁴⁹ Sir David Wedderburn MP, HC Debate, 3rd Series, volume 201, col. 466 (10 May 1870).

⁵⁰ Page, *Constitutional Law*, p. 89.

out and stating the principles on which Crown Office acted and how it was very difficult to predict their actions.⁵¹ It was also noted that the decisions of the Crown Office are in the last resort administrative decisions.⁵² Arguably, in the overall approach to criminal justice policy such as it was in that period there was a notion that as a head office for a system of public prosecution that inherent authority was being used for the good of the community.⁵³ It seems clear that the approach as a matter of policy by Crown Office to a crime or any aspect of crime can affect how crime is recorded in Scotland.⁵⁴

Finally, in the absence of an office of Coroner in the Scottish legal system, in the modern era the investigation of accidental and sudden deaths was a matter initially for the police who then reported the matter to the Procurator Fiscal.⁵⁵ Certain deaths were required to be reported thereafter to Crown Office where Crown Counsel maintained a supervisory role.⁵⁶ The extent of discretion to be exercised by the Lord Advocate in that regard became enhanced greatly by the reforms of 1895 and 1906 following which Fatal Accident Inquiries were required or in some circumstances may be held.

2 The Business of the Office

The appointment of a Procurator Fiscal by the Sheriff was on a commission that was 'virtually' *ad vitam aut culpam*.⁵⁷ The confidence entrusted to someone selected to hold such a commission is not to be understated and nor should the difficulty that would arise in any attempt to remove such a commission holder.⁵⁸ Moreover, the salary for a Procurator Fiscal in these circumstances was paid out of the Imperial Exchequer.⁵⁹ The Sheriff Court (Scotland) Act 1877 made provision for the appointment and removal of Procurators Fiscal with their accountability to the Imperial Parliament.⁶⁰ It was only as late as 1907 that Sheriffs were entirely deprived of their right to appoint and remove their own Procurators Fiscal: Sheriff Court (Scotland) Act 1907 s. 22.

⁵¹ G.H. Gordon, *The Criminal Law of Scotland* (Edinburgh: W. Green; 1st ed. 1967) p. 5.

⁵² *Ibid.*

⁵³ A. Tomkins, *The Crown in Scotland* in A. McHarg and T. Mullen, *Public Law in Scotland* (Edinburgh; 2006) p. 278.

⁵⁴ See A.M Kilday, 'Hell-Raising and Hair-Razing: Violent Robbery in Nineteenth Century Scotland' (2013) *Scottish Historical Review*, XCII, no. 235, pp. 255-274, at p. 259 for some other factors.

⁵⁵ H.H. Brown, *The Procedure in Accident Inquiries and Investigations* (Edinburgh: T & T Clark, 1897) p.7.

⁵⁶ *Ibid.*, pp. 9, 19, 53, 72 and 78.

⁵⁷ D. Dewar, *Criminal Procedure in England and Wales* (Edinburgh: W Green, 1913) p. 35; and see Anon. 'The Recent Order in Council as to Civil Service Retirement', (1899) 15 *Scottish Law Review* 1-4.

⁵⁸ D.M.R. Esson, 'Ad Vitam Aut Culpam' (1972) *Juridical Review* 50 explains related difficulties.

⁵⁹ Dewar, *Criminal Procedure* p. 32.

⁶⁰ R.S. Shiels, 'The Structure of Authority and the Prosecution of Crime in the Sheriff Courts of Scotland of Mid-Victorian Scotland' *Law, Crime and History* (2014) 3, 56-73

The period under present consideration ends with the Sheriff Courts and Legal Officers (Scotland) Act 1927. Section 1(2) of that Act provided that the right of appointing to and removing from the office of Procurator Fiscal was vested in the Lord Advocate. The Lord Advocate may from time to time fix the number of Procurators Fiscal in Scotland and the limits of the districts for which such procurators [sic] shall act. Section 1(3) provided that no Procurator Fiscal shall be removed from his office except upon a report by the Lord President of the Court of Session and the Lord Justice Clerk.⁶¹ This latter authority when applied meant 'practically a life appointment'.⁶² The Lord Advocate was assured of the authority to transfer a Procurator Fiscal from one district to another office if that transfer was for the purpose of securing efficient organisation and administration.⁶³ This too enhanced the necessity for scrutiny and management of what was increasingly becoming a more coherent and unified system rather than a collection of individual lawyers.

3 National Procedural Authority

Professor Mirjan Damaska has proposed two ideals of officialdom as modes of organising procedural authority. He suggests that only two composite structures of authority need be considered from amongst a large number that could be considered possible in a complex classificatory scheme. The first structure essentially corresponds to conceptions of classical bureaucracy. It is characterised by a professional corps of officials, organised into a hierarchy that makes decisions according to technical standards. The other structure has no readily recognisable analogue in established theory. It is defined by a body of non-professional decision-makers, organised into a single level of authority that makes decisions by applying un-differentiated community standards. The first structure is called by Damaska the hierarchical ideal or vision of officialdom, and the second is termed the co-ordinate ideal.⁶⁴

Damaska has argued that the elements of the hierarchical ideal, namely, professionalization of officials, strict hierarchical ordering and technical standards for decision making, make for a system that the traditional Anglo-American decision-maker would profoundly dislike while a Continental counterpart would find the 'ambience much more congenial, even if it caricatures the environment in which he is accustomed to operate'.⁶⁵ Might these elements, amounting to

⁶¹ This authority followed Sheriff Court (Scotland) Act 1907 s.23.

⁶² E.R. Keedy 'Criminal Procedure in Scotland' (1912-1913) 3 *J. Am. Inst. Crim. L & Criminology* 728-753, 834-854, 742.

⁶³ Sheriff Courts and Legal Officers (Scotland) Act 1927 (c. 35), s. 1(4).

⁶⁴ M Damaska, *The Faces of Justice and State Authority* (New Haven: Yale University Press, 1986) p. 17.

⁶⁵ Damaska, *The Faces of Justice and State Authority* p. 18.

the significant generic notions identified by the professor, be seen within the conduct of business in Crown Office?

Professionalization of officials

Permanently placed officials carve out a sphere of practice which they regard as their special province and, over time, they also develop a sense of identity with similarly situated individuals.⁶⁶ It is a managerial truism in our age that it is unfair to single out any one individual as the basic unit of work practice is the team: in the time of David Duncan, however, there is a real possibility that he was in effect mainly the team. His continuous service made him a permanently placed official with 47 years in Crown Office, from 1847 to 1894, that suggest that he was the 'repository of precedents'. He served during 12 governments and under 16 Lord Advocates and 11 Crown Agents. He was central to the workings of an office: 'where every form of criminal inquiry in Scotland is closely supervised'.⁶⁷ It is indicative of the continuity of service that David Duncan was on retirement followed by Hugh Milroy as Chief Clerk. By 1903 on resignation Hugh Milroy had managed to accumulate 35 years' service. It was perhaps a mark of societal change that Hugh Milroy, unlike David Duncan, had attended university and qualified as a solicitor before entering Crown Office.⁶⁸

The Advocates Depute whom the Lord Advocate as a fellow member of the Faculty of Advocates would know well. Deputed to the Lord Advocate was not the same as holding office as local representative. The relation between the Lord Advocate and his Deputes is in the last degree a personal one. It is a temporary office, and is only held under the Lord Advocate who makes the appointment. By the nature of their duties they are brought into unrestricted and sometimes confidential communication. The Lord Advocate is personally responsible for the proper discharge of duties which he should primarily perform himself, but which he is allowed to delegate. So great is the *delectus personae* involved that it is in the etiquette of the profession it is considered indecorous to use 'political influence' to obtain it. No doubt it is generally given, along with other qualifications, as a reward for a certain amount of party distinctions; but that is a point which falls amply within the observations of the Lord Advocate himself, and on which he is entitled to form his own opinion.⁶⁹ The existence and permanent presence of Crown Counsel, the collective name for the Law Officers and the Advocates Depute, has to be acknowledged as amounting in practice to the controlling mind of the system of public prosecution. They do not, however, hold positions that amount to those of permanent officials.

⁶⁶ Ibid.

⁶⁷ Obituary, 'The Late Mr. David Duncan', (1898-1899) 6 *Scots Law Times* 154.

⁶⁸ 'Hugh Milroy', (1903-1904) 11 *Scots Law Times* 101.

⁶⁹ Anon. 'The Criticisms on [sic] the Lord Advocate' (1868-1869) 6 *Scottish Law Reporter* 13-17, at p. 16.

Secondly, the Lord Advocate was responsible constitutionally for the Procurators Fiscal of Sheriff Courts all of whom who had been appointed by a Sheriff as a judicial office holder. Those appointed held office *ad vitam aut culpam* until changed to a comparable statutory authority under the 1927 legislation. Thus, due to the Sheriff Court (Scotland) 1877 the Lord Advocate was responsible to Parliament for a professional office-holder virtually irremovable and appointed by someone else, the Sheriff.

The crucial point procedurally was that of an accused having been arrested and brought before the Sheriff sitting judicially. The Procurator Fiscal was under the direction of the Sheriff until there was, in regard to the accused appearing on petition, sufficient evidence to have the accused committed for trial. The moment the prisoner was committed for trial, they [Procurators Fiscal] became the servants of the Lord Advocate, and had to take their directions from him.⁷⁰ From the legislation of 1877 the Lord Advocate became responsible for a professional office-holder appointed by someone else, a Secretary of State and in practice the Home Secretary, who was answerable to the Imperial Parliament. This was suggestive of a changing balance between central and local government in the United Kingdom particularly in the context of the centralism and accountability for Scotland.⁷¹ From the 1907 legislation the Lord Advocate responsible to Parliament for someone whom he had appointed. Removal from office of the Procurators Fiscal of Sheriff Courts from 1877 to 1927 was in practice almost impossible because of the judicial commission. Thus, down to 1927 the Procurator Fiscal of the Sheriff Court had accumulated delegated authority from the Sheriff and with a judicial commission: the local public prosecutor was in effect a quasi-judicial appointment and the decisions appropriately taken on an independent view of the facts. Crown Office and thereby Procurators Fiscal of Sheriff Courts became to be seen as at some distance from politics and the appointments of the latter were seen in this period as non-political.⁷²

Strict hierarchical ordering

Officials are organised into several echelons: power comes from the top, trickling down the levels of authority. Great inequalities among officials at different hierarchical positions are characteristic.⁷³ The great division of inequality was between the established civil servants, whose employment was assured, and the others, members of the Scottish Bar, who risked all when participating in the free market. The latter category showed in extremis the strict

⁷⁰ HC Deb, July 28, 1877, vol.236, c.89.

⁷¹ R.S. Shiels, 'The Structure of Authority and the Prosecution of Crime in the Sheriff Courts of mid-Victorian Scotland' *Law, Crime and History* (2014) 3, 56-73.

⁷² R.S. Shiels, 'The New Procurators Fiscal in Late-Victorian and Edwardian Scotland', (2014) *Juridical Review* 121.

⁷³ Damaska, *The Faces of Justice and State Authority* p. 19.

hierarchical ordering posited by the Continental ideal. The Lord Advocate was the peak of several pyramids: first, the office-holder was ‘the Public Prosecutor’ for Scotland with associated authority.⁷⁴ Next, a leading member of the Bar usually with extensive professional experience, next the head of the nascent Scottish administration that could not be called government in any completed sense, generally speaking a lodestone as dispenser of appointments judicial and otherwise, and, certainly not least, a quasi-ambassador for Scotland in the Imperial Parliament. There was accordingly in the Victorian era little doubt as to the need politically for the Lord Advocate to be a Member of the House of Commons.⁷⁵ The hierarchy was confirmed with the rank of Solicitor General for Scotland, a senior managerial and legal appointment from which, unlike that of Lord Advocate, promotion was possible. While not in the early period expected to be a Member of the Parliament that became the practice.⁷⁶

The next level of professionalisation was that of the Advocates Depute. Ostensibly, all ranked *pari passu* but the hierarchy within their ranks showed a degree of seniority, certainly after 1897 when the rank and dignity of silk was introduced. As counsel in practice lived in Edinburgh, invariably through the legal year, the entitlement to prosecute there and thus without going on circuit was primarily that of the Lord Advocate. Sir Archibald Alison refers to prosecutions in Edinburgh ‘under the direct supervision of the Lord Advocate’ which is not quite the same arrangement of business.⁷⁷ Otherwise, the preparation of the indictment of the case was the responsibility of the Advocate Depute to whom the case was entrusted. With both law officers in London the creation of the office of Senior Advocate Depute ‘over three deutes who were all ... senior’ to the appointee indicated the existence of a general expectation, and a preferential treatment.⁷⁸ At any rate, the rule seemed to be in this era that the more senior the Advocate Depute the less likely he was to go out on circuit.

Technical standards for decision making

Damaska has identified a legalistic approach to technical decision-making within what he calls judicial organisations.⁷⁹ Under this approach the officials are expected to make a particular decision when facts are found that are specified under a normative standard:

The propriety of the decision is evaluated in terms of fidelity to the applicable standard. This is not to imply that the legalistic approach is indifferent to consequences resulting from official action: those who fashion the standards are expected to make the

⁷⁴ Sir Archibald Alison, *Practice of the Criminal Law of Scotland* (Edinburgh: Wm blackwood; 1832) pp. 84-98.

⁷⁵ See the short debate on 22 March 1867 about the difficulties arising from the then Lord Advocate (E.S. Gordon) not being a Member of Parliament: H.C. Deb, vol. 186, cc. 397-400.

⁷⁶ (1888) 32 *Journal of Jurisprudence* 645, p. 650.

⁷⁷ Alison. *Practice* p. xix.

⁷⁸ (1888) 32 *Journal of Jurisprudence* 645-646.

⁷⁹ Damaska, *The Faces of Justice and State Authority* p. 21.

necessary instrumental calculations and to design standards capable of advancing organisational goals.⁸⁰

Procurators Fiscal in the Sheriff Courts were controlled to a substantial degree by the requirement that they adhered to specific instructions from Crown Office and examples still exist. By instruction in a circular dated 24 December 1866 the Lord Advocate required adherence to directions as to the inquiries to be made by Procurators Fiscal into the origins of fires especially if death ensued. Not least of the desirable results was a uniformity of practice.⁸¹ The culmination of these instructions was the Book of Regulations issued in July 1868: the book itself as a logical, coherent, comprehensive and systematic statement of prosecutorial policy that deserves its own analysis. It sought unquestionably to seek nationally directed practices and harmonisation of decision-making. The book had an introduction under the name of the Crown Agent, T.G. Murray, although necessarily on the authority of the Lord Advocate.⁸² According to the Introduction:

The Lord Advocate, therefore, directs that these Regulations, now circulated to Procurators Fiscal, shall form the code of instructions to be observed by them in criminal and other investigations.

The book was, and in its modern form is, a mandatory technical standard for decision-making. Its appearance coincided with a public issue of dissatisfaction with the expense, delay and uncertainty of the civil courts in Scotland.⁸³ While Crown Office was not part of the 'civil courts' of Scotland it was integral to Parliament House and it is not immediately obvious that the efficiency of the administration supporting the Law Officers then was necessarily excluded from the generality of the issue. The book can only have sharpened attitudes amongst local public prosecutors and promoted consistent decision-making. The Crown Agent's Office, or later Crown Office, with a general supervisory capacity was a route for complaints against Procurators Fiscal and some indication of these remains.⁸⁴ In the general file 'Crown Agent's Correspondence' a wide variety of letters have been retained and about a dozen covering 30 years are complaints about Procurators Fiscal or requiring a report from an office holder. The papers are limited and much that might have assisted in explaining what had happened has been excised. Still, a letter of April 18, 1865 from the Crown Agent to the Procurator Fiscal at Glasgow called for a report on a specified matter. That was hardly unique; the existence of a competent means of complaint by a member of the public is shown by other letters, for

⁸⁰ Ibid.

⁸¹ Anon. 'Origins of Fires' (1866-1867) 3 *Scottish Law Reports* 27.

⁸² Edward Strathearn Gordon, later Lord Gordon of Drumearn, a Lord of Appeal in Ordinary.

⁸³ Hansard: HC Deb 03 December 1867 vol. 190, cc. 536-7.

⁸⁴ National Records for Scotland AD56/29.

example, the letter of June 4, 1872 from the Crown Agent to the Lord Advocate about a decision by the Procurator Fiscal at Inverary.⁸⁵

4 Discussion

The importance of locating the authority of Crown Office is not to be underestimated given its general centrality. The purported absence of 'rules, statutory or otherwise, that determined the flow of cases to the various courts' has been noted by at least one historian.⁸⁶ That point though omits any recognition of the centrality of the directing authority of Crown Office either by the Lord Advocate personally or probably more often in his place by Crown Counsel exercising a delegated discretion. Moreover, from 1868 the Book of Regulations issued to Procurators Fiscal in Sheriff Courts encouraged uniformity in decision-making capacity, the need for justification of actions taken by local public prosecutors and consequential accountability within a hierarchy: 'In the nineteenth century a vast reform movement swept across European criminal procedure, as part of the process that led to the creation of modern democratic states'.⁸⁷ As part of the formation of policy there was serious consideration of alternatives that were developing elsewhere. Thus, by the mid-1860s it was suggested by a Prussian commentator as a model for a continental jurisdiction that:

The best organisation of public prosecution would be found in the effectual centralisation of it in the hands of a responsible superior magistrate, exercising his functions with the assistance of other officers appointed for certain districts, and having subordinate to his orders the criminal police of the whole country, for the purpose of prosecuting those criminals who are in the habit of absconding, and for the further purpose of keeping up a regular registration of all convicted felons. To attain this object, the criminal police in Prussia are obliged to obey the orders received from the State attorneys.⁸⁸

Some elements of this normative description existed already in Scotland but developments towards the end of the nineteenth century, it is suggested, show an acceptance of this model. There a recognisably Scottish theory of almost exclusive public prosecution.⁸⁹ Although, such an approach was well known at the time, and since, the true origins of the theory remain uncertain and appear not to have been located in any precise text or writings: the receptive

⁸⁵ The letters are limited and refer to other papers that are not there.

⁸⁶ P.T. Riggs, 'Prosecutors, Juries, Judges and Punishment in Early Nineteenth-Century Scotland', *Jo. of Scottish Historical Studies*, 32.2, (2012), 166, p.168.

⁸⁷ J.H. Langbein, *The Origins of Adversary Criminal Trial* (Oxford: Oxford University Press, 2003) p. 342.

⁸⁸ Baron Holtzendorff, 'On Public Prosecution in Prussia' in G.W. Hastings, *Transactions of the National Association for the Promotion of Social Science* (London: John W. Parker, Son and Bourne; 1862) p. 144.

⁸⁹ R.S. Shiels, 'The "Scotch Theory" and the Procurator Fiscal', (2008) *Scottish Criminal Law* 1291 at p. 1294.

approach to contemporary continental ideas does seem to have been notable particularly in the absence of any guidance or opposition from the Imperial Parliament.

It could be said that 'Crown Office', formerly merely a few rooms for accommodating clerks and the reception and retention of papers and the mundane but necessary preparations immediately before going into court, is now patently a large physical building but at the same time separately embodies a procedural concept in law. While the first was located at various places over time it was obvious to the onlooker, the latter depending on administrative and legal requirements at different times remains elusive. The brief history of Crown Office does not necessarily specify either the physical place or the range of procedural authority inherent in the place.⁹⁰

The Victorian era was to the turn of the twentieth century at least one of a minimal state which proved remarkably enduring in practice and there seemed to be nothing politically which suggested a need to modify or to amend it.⁹¹ There was no common law or statutory authority that brought into existence Crown Office: it merely evolved from a few rooms into a State-centred place of order and authority that served the legal profession. It was the 'Crown Agent's Office' in 1868 and somehow that title had changed, more formally perhaps, to 'Crown Office' by 1888. The location of a mere office somehow by subliminal process had elided formal establishment and had become a centre of governmental authority. A full history of the place of Crown Office from the statutory reforms of 1927 to the present time is a different story and requires separate consideration. It remains a matter for comment that the precise nature and character of the constitutional place of Crown Office in regard to the Crown in Scotland seems never to have been specified or doubted.⁹²

It is incontrovertible that with devolution from Westminster the organisation of the business in Crown Office changed.⁹³ The disparate changes and developments within the Scottish system were when taken together a clear indication evolution of an institution with appropriate procedures of criminal investigation and trial that were responsible for and capable of seeking the truth.⁹⁴ The office was introduced and promoted within the context of what might now be regarded as public law although the sources of the influence on Scots law or the precise model

⁹⁰ Eg L.J. Gordon, 'The Lord Advocate and the Crown Office' in M.R. McLarty and G.C.H. Paton (Eds.) *A Source Book and History of Administrative Law in Scotland* (Edinburgh: Wm. Hodge, 1956) pp. 55-63.

⁹¹ H.C.G. Matthew, *Gladstone: 1875-1898* (Oxford: Clarendon Press; 1995) p. 388.

⁹² Cf *British Medical Association v. Greater Glasgow Health Board*, 1989 SC (HL) 65.

⁹³ E. Angiolini, 'Legislation, Litigation and Prosecution: The Role of a Scottish Law Officer' (2003) *Juridical Review* 219, p. 220.

⁹⁴ Cf Langbein, *The Origins of Adversary Criminal Trial*, p. 343.

that may have been a template remain to be discovered. The question for the future that lay immediately after the 1927 Act was not to ask whether State power lay in Crown Office but rather, first, what power lay there and, secondly, why did no one object to the expansion of an office apparently secured on pragmatism. One point is certain: with so few people driving forward so small and yet so influential a locus of power in the Scottish legal system there could then be no complaint of 'the sclerotic tendencies of governmental bureaucracy'.⁹⁵ By 1927 the State power inherent in a system of public prosecution was essentially diffuse in nature with the local public prosecutors answerable directly to the Lord Advocate in particular and to Crown Office in general and thereby directly to the Imperial Parliament. The discretion allowed by the Book of Regulations was a broad one that allowed for the application of local knowledge given the regional differences within the jurisdiction of Scotland.

Concluding Remarks

The terms 'State', 'Crown', 'government' and 'public' do have different uses, and represent distinctions that it may be useful not to obscure under a single head.⁹⁶ One writer sought to illustrate that assertion with consideration being given to criminal procedure: with specific reference to 'Britain' this example has 'certain, possibly unique, features which stem partly from plurality in the public official personality'.⁹⁷ The oddity of the example then explained is that it asserts a principle from which Scotland is purposely left out of the account. General explanations of Crown Office tend to be directed at function within the legal system with an apparent indifference as to how as a government department those functions are achieved. Thus, somewhat blandly stated the 'central machinery responsible for the smooth functioning of Scotland's indigenous machinery of prosecutions and criminal law administration remains in Scotland and is located in the Crown Office'.⁹⁸ Such a statement is correct and yet takes no account of the administrative history against which the development of Crown Office ought to be considered.

The term 'Crown Office' is probably a misnomer. The monarch or sovereign personally, as an individual, has nothing to do with the administration of criminal justice. Indictments in Scotland run in the name of Her Majesty's Advocate although that in essence is the Lord Advocate acting in the public interest, and not on behalf of the monarch, although that was originally the case.⁹⁹ On that basis, the 'State Prosecution Office' might be a more accurate description

⁹⁵ N. Ferguson, *Kissinger, 1923-1968: The Idealist* (London; Allen Lane, 2015) p. 458.

⁹⁶ G. Marshall, *Constitutional Theory* (Oxford: Clarendon Press, 1971) p. 25.

⁹⁷ *Ibid.*

⁹⁸ J. Ll. J. Edwards, *The Attorney General Politics and the Public Interest* (1984), p. 294 and fn. 38.

⁹⁹ D.M. Walker, 'The Legal Theory of the State' (1953) 65 *Juridical Review* 255 at p. 256.

although it has been said that it is better that old and honourable institutions should continue to bear their old familiar names which would avoid: 'the monotony and the unpleasant emphasis on an all-pervading presence of a Leviathan which would arise from saddling many bodies and agencies with the adjective 'State''.¹⁰⁰ The latter comment may or may not be anachronistic but it reflected the contemporary concerns, or at least those of a Professor of Law, antipathetic towards a socialist Government in the immediate post-Second World War era.

There was a 'silent revolution' that overtook Whitehall and Westminster between 1830 and 1914. In that period Britain was transformed politically from laissez faire individualism to policies of collectivism.¹⁰¹ Care has to be taken with the approach to this broad view and the particular circumstances of Crown Office. The attitude to the purpose of government changed over time and in the mid-Victorian era when Crown Office seems to have changed in authority and status, Ministers still saw government as 'the pragmatic administration of the Queen's business tempered by the need to accommodate parliamentary or public pressure'.¹⁰² As late as August 1881, Wm Gladstone when Prime Minister wrote to Sir Wm Harcourt then Home Secretary and asked in his letter:

Is it the fact that the Lord Advocate has in Scotland an office and business of his own, apart from the Home Office? If so and this embraces a principal part of his functions it would be well for him to say so?¹⁰³

The note that accompanied that letter and was apparently sent in reply made no mention of the existence of Crown Office but merely refers to the general responsibility of the Home Secretary and necessary reliance on officials: 'well versed in the business of that part of the United Kingdom'.¹⁰⁴ Whether that constituted wilful blindness or not is debatable, but it does support strongly the idea of Westminster as a 'highly specialised community'.¹⁰⁵ It also signals the very wide discretion allowed to those who participated in central government of Victorian Scotland. The system of public prosecution in Scotland seems to have been inconsistent with the model of criminal administration in England, but there was no interference from the Imperial Parliament. Indeed, there was recognition that things were done differently in Scotland.¹⁰⁶ That approach accorded with the principle that each nation is the best judge of

¹⁰⁰ Ibid.

¹⁰¹ R. MacLeod, *Government and expertise: specialists, administrators and professionals, 1860-1919* (Cambridge: Cambridge University Press, 1988) p. xiii.

¹⁰² T. Little, 'The Liberal Heyday (1859-1886)' in R. Ingham and D. Brack, *Peace, Reform and Liberation* (London: Biteback; 2011) p. 90.

¹⁰³ Bodleian Library: MS, Harcourt, dep 8, fol. 98-99.

¹⁰⁴ Bodleian Library: MS, Harcourt, dep 8, fol. 101-102..

¹⁰⁵ A.B. Cooke and J. Vincent, *The Governing Passion: Cabinet Government and Party Politics in Britain 1885-6* (Brighton: Harvester Press; 1974) p. 22.

¹⁰⁶ R.S. Shiels, 'The 'Scotch Theory' and the Procurator Fiscal', p. 1291.

the legal establishments that are adapted to its own circumstances.¹⁰⁷ The emergence of Crown Office coincided with the development elsewhere of a Scottish administration.¹⁰⁸ Such a central source of a lesser form of command and control was thought necessary for an effective system of public prosecution and it coincided with the increasing irritation about the inadequacy of the Scottish administration.¹⁰⁹

By the time of the creation of the Scottish Office in 1885 there were already various departments overseeing aspects of public administration. There has been historical consideration of these 'functional boards' but no mention of Crown Office.¹¹⁰ Of course, Crown Office was more than such a pejorative term but it was an element in the government of Scotland albeit a highly discrete one. On a practical level the volume of papers accumulated since about the 1840s when the state prosecution papers began to be saved meant that there had to be somewhere to retain all these historical records that of course constituted individually some sort of legal precedent. These were not necessarily binding precedents in the English sense but rather illustrative examples of the past application of principle. At any rate, in Scots law there was nothing to inhibit the growth of a controlling centre of a system of public prosecution and the judicial and general legal antipathy to private prosecutions in principle assisted in that regard. Further, the Imperial Parliament did not dissuade or prohibit a model which was not an invention of the Scots but suggested, following Professor Damaska's argument of a hierarchical ideal, a strong influence from a Continental model. The development of Crown Office from 1927 to the present day would doubtless demonstrate other contemporary political and economic influences and it may indeed confirm the accuracy of the kindly academic reference to the 'long-established, generous and humane tradition' of Crown Office.¹¹¹

¹⁰⁷ Alison, *Practice* p. xxxi.

¹⁰⁸ A. Page, *Constitutional Law of Scotland*, p. 11.

¹⁰⁹ H.J. Hanham, 'The Creation of the Scottish Office' 1965 *Juridical Review* 205 at p. 206.

¹¹⁰ E.A. Cameron, 'From Engrossing Clerks to Mandarin: Civil Servants in Scotland' in M.A. Mulhern et al *Scottish Life and Society: The Working Life of the Scots* (Edinburgh: John Donald, 2008) p. 543.

¹¹¹ T.B. Smith, *Studies Critical and Comparative* (Edinburgh: W. Green & Son; 1961) p. 269.